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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. RICHARD RAYMOND SMITH, Defendant and Appellant.	C041965 (Super. Ct. No. 00F10257)

A jury found that defendant Richard Raymond Smith voluntarily acted in concert with others in assaulting Tyrone Edwards with a deadly weapon because of Edwards's race or color (Pen. Code, §§ 245, subd. (a)(1), 422.75, subd. (c)),[1] inflicted great bodily injury upon Edwards (§ 12022.7, subd. (a)), voluntarily acted in concert with others in assaulting Calvin Stewart with a deadly weapon because of Stewart's race or color (§§ 245, subd. (a)(1), 422.75,

[1] Further section references are to the Penal Code unless otherwise specified.

subd. (c)), and maliciously damaged Stewart's car (§ 594, subd. (a)). Defendant was sentenced to state prison for an aggregate term of nine years and eight months.

On appeal, defendant contends there is insufficient evidence that he committed the two assaults "because of" the victims' race or color, and the trial court committed instructional error. We shall affirm the judgment.

FACTUAL BACKGROUND

Viewed in the light most favorable to the judgment (*People v. Hernandez* (1988) 47 Cal.3d 315, 345), the evidence was as follows:

At around 2:45 p.m. on November 5, 2000, Calvin Stewart and Tyrone Edwards, both African-American men, were playing pool at Six Pocket Billiards in Rancho Cordova. As they played their first game, they noticed an unusually loud and vulgar group of men, including defendant, playing at a table about six feet away. Defendant's group consisted of two Hispanic men and three Caucasian men.

During Stewart's and Edwards's second game, Stewart heard someone from defendant's group loudly say, "What the fuck?" Stewart looked over and made eye contact with defendant, who angrily asked "what the fuck" Stewart was looking at. When Stewart did not respond, defendant approached him in a hostile manner and repeatedly asked "what the fuck" he was looking at. Stewart told either defendant's group or the pool hall employees that he did not want any trouble.

At this point, someone in defendant's group tried to restrain defendant and pull him back, but defendant broke away and came back towards Stewart's table. Stewart told defendant that he did not have a problem with him and asked why he was at Stewart's table. After a member of defendant's group coaxed defendant away, telling him "These guys don't want no problem with you," Stewart heard defendant say, "if he looks at me one more time[,] I'm going to go over there and bust him in the mouth."

After this exchange, Stewart told Edwards that he wanted to leave and started toward the exit. Edwards took a sip of his beer, put his pool cue on the rack, and turned to go. At this point, defendant suddenly "jumped in [his] face" and asked him "what the fuck" his friend's problem was. Defendant was holding a pool cue at his side. Edwards told defendant to ask Stewart and proceeded toward the exit. As Edwards turned away, he felt a blow strike his ear and head. Dazed, he turned around and found defendant holding a broken pool cue; everyone else was at least 15 to 20 feet away. Edwards tried to make his way to the exit, but defendant and his friends swarmed in and began hitting Edwards with pool cues. By the time Edwards reached the exit, he had been hit eight to ten times by the five men.

Meanwhile, Stewart had walked outside toward his car, which was parked in front of the pool hall. He heard some noise and turned to see Edwards running toward him with men chasing behind. Several of the men were wielding pool cues, including defendant. Stewart deactivated his car alarm but was unable to get inside as two of the men (including defendant) who were

pursuing Edwards started chasing Stewart around his car, swinging their pool cues. The men were yelling racial epithets. A pool cue was broken on Stewart's window.

Defendant and some of his group chased Stewart as he ran towards a nearby store. Defendant yelled, "kill that nigger, get that nigger, fuck that nigger, this ain't his fucking pool hall." Defendant was only about 15 feet away when he yelled those remarks. Others in defendant's group chased Edwards toward the light rail station, throwing rocks and a boulder at him. Defendant was the principal person making the racial slurs.

Eventually, defendant and his group gave up the chase and headed back towards the pool hall. Those in front of the pool hall were yelling, "hurrahing," and apparently supporting defendant and his group. Someone yelled, "bust his window out," and defendant picked up a boulder, climbed onto the roof of Stewart's car, and smashed the boulder through the windshield. Defendant then jumped around on the hood of the car. Stewart called the police from his cell phone and watched as defendant and his group got into their vehicles and drove away.

Edwards was taken to the hospital and received 12 stitches in his ear. Both Stewart and Edwards were able to identify defendant in a photographic line-up.

Defendant testified as follows:

He had been at the pool hall with his friend, Leonard Hart, and an acquaintance, Eric Wright. While they were playing pool, two Hispanic men approached and asked if they wanted to gamble on

a game. They agreed to a game of "nine ball" with the winners to take $100. Wright was to pay half of the $100 if they lost.

As defendant was preparing to take a shot, someone bumped him, causing him to miss the shot and lose the $100. Thinking that Hart had bumped him, defendant said, "What the fuck?" Then he realized it was Stewart who bumped him. Defendant felt Stewart should pay for half the money defendant lost on the shot, and he and Stewart argued briefly. When Stewart said he was going to "kick his ass," defendant went back to his table.

After defendant was unable to convince the competitors to play the game over, Wright began arguing with Stewart. When Stewart went outside, Wright started arguing with Edwards. As Wright and Edwards argued "nose to nose," defendant came over to see what was going on. Edwards turned to take a sip of his beer, and Wright suddenly struck Edwards on the head with his pool cue.

Edwards announced, "I'm gonna shoot your ass," and Wright responded, "Shoot me then." Edwards turned and ran toward the exit, and Wright chased him, still wielding a pool cue. Wright struck Edwards several more times with his pool cue as he chased him out of the pool hall.

Hart told defendant, "Let's go," and said he did not want to leave with Wright because Wright was drunk and violent. Hart and defendant then left the pool hall.

When defendant got outside, he saw Wright standing near a car. Stewart went for his trunk, apparently to get a gun. Wright ran off. Thinking they were going to be shot, defendant picked up a

rock and threw it through the windshield in an attempt to divert Stewart's attention.

When Stewart turned and ran toward them, defendant, Hart, and Wright jumped into their van and drove off. Defendant denied yelling any racial epithets, although he did hear Wright call Edwards "the N word" while they were in the pool hall.

Hart also testified at trial, essentially mirroring defendant's testimony.

DISCUSSION

I

Section 422.75, subdivision (c), provides in pertinent part that a defendant "who commits a felony . . . *because of* the victim's race, color, religion, nationality, country of origin, ancestry, gender, disability, or sexual orientation, or because [the defendant] perceives that the victim has one or more of those characteristics, and who voluntarily acted in concert with another person, either personally or by aiding and abetting another person, shall receive an additional two, three, or four years in the state prison, at the court's discretion." (Italics added.)

Defendant claims there is insufficient evidence he committed the two felonious assaults "because of" the victims' race or color.

Among other things, defendant argues that he "denied making any racial remarks, and nothing he testified to indicated that he was motivated out of hate for the victims' race or color. . . . [Instead,] he was angered when Stewart bumped him and caused him to lose $100." This argument essentially asks us to reassess the credibility of the witnesses and accept defendant's version of the

events and reason for his actions. This is not a proper appellate function. (*People v. Jones* (1990) 51 Cal.3d 294, 314-315.)

"The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] [¶] Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.]" (*People v. Jones, supra,* 51 Cal.3d at p. 314.)

As the People point out, the jury reasonably inferred from the racial threats and epithets uttered by defendant that he attacked the victims "because of" their race.

Defendant disagrees because, in the words of his appellate counsel, "[t]hese comments were made either after both assaults were completed, according to Stewart's version of events, or after the assault in the pool hall was completed. In any event, they were made after the two groups, [defendant]'s group and Stewart and Edwards, were involved in an altercation. At this point, [defendant] had, according to the victims, already acted violently, emotions were high, and the altercation was well under way. There is no evidence that the race or color of the victims[] spurred

either of the assaults. [¶] In fact, the evidence suggests the motive for [defendant]'s actions was [his] perception that Stewart was staring at him." We are not persuaded.

As we have noted, section 422.75, subdivision (c), increases the punishment for a felony committed in concert with others because of the victim's race or color. Subdivision (i)(1) of section 422.75 defines the phrase "because of" to mean "that the bias motivation must be a cause in fact of the offense, whether or not other causes also exist. When multiple concurrent motives exist, the prohibited bias must be a substantial factor in bringing about the particular result."

The motive with which a person acts may be inferred from his subsequent conduct. (*Tranchina v. Arcinas* (1947) 78 Cal.App.2d 522, 524.) Here, the jury reasonably inferred that defendant's racial threats and slurs demonstrated his motive for attacking Edwards and Stewart. Those vicious remarks, coupled with the ferocity of the assaults, support the jury's determination that the victims' race or color was a substantial factor in motivating defendant's felonious assaults against them.

II

Defendant complains that the trial court failed to instruct sua sponte with definitions of the phrases "cause in fact" and "substantial factor" in subdivision (i)(1) of section 422.75.[2] We find no error.

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[2] Defendant also contends the court was required to instruct the jury sua sponte with a definition of "concurrent cause." But

The trial court instructed as follows: "It is alleged in Counts One, Two, and Three that the defendant committed the crimes charged in those counts because of the victims' actual or perceived race or color. The victims' race or color does not need to be the only motive for the commission of the crime. [¶] Because of, as used in this instruction, . . . means that the bias motivation must be a cause in fact of the offense, whether or not other causes also exist. Multiple concurrent motives may exist. When multiple concurrent motives exist, the prohibited bias must be a substantial factor in bringing about the crime. [¶] If you find the defendant guilty of the crimes charged in Count One or Count Two or Count Three, or all of them, you must then determine whether or not the victims' actual or perceived race or color was a substantial factor in the commission of the offense."

Although defendant claims the court was required to provide a technical legal definition of the phrases "cause in fact" and "substantial factor," he does not provide any proposed definitions that he believes should have been given to the jury. He merely argues that "'[s]ubstantial' is an imprecise quantitative term" and "'cause in fact' . . . has had varying meanings in the law [which] indicate[] that it is legalistic and has a non-standard meaning that jurors are not necessarily privy to."

A trial court has a duty to give sua sponte amplifying or clarifying instructions when terms used in an instruction have

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no instruction was given to the jury using the words "concurrent cause." Thus, we do not address this argument.

a technical meaning peculiar to the law. However, a court has no such duty when the terms used are commonly understood by those familiar with the English language. (*People v. McElheny* (1982) 137 Cal.App.3d 396, 403.)

As we will explain, the terms "cause in fact" and "substantial factor" as used in the instruction, have no particular legalistic meaning giving rise to a duty to clarify them sua sponte.

Defendant's reliance on *Mitchell v. Gonzales* (1991) 54 Cal.3d 1041 (hereafter *Mitchell*), for the proposition that those terms have particular legalistic meanings is misplaced. In *Mitchell,* the California Supreme Court disapproved the use in civil cases of BAJI No. 3.75, the proximate cause instruction containing a "but for" test. The Supreme Court held that BAJI No. 3.76, the legal cause instruction employing the "substantial factor" test of cause in fact, should be used instead. (*Id.* at pp. 1044-1045, 1052-1054.) BAJI No. 3.76 states: "The law defines cause in its own particular way. A cause of [injury] [damage] [loss] [or] [harm] is something that is a substantial factor in bringing about an [injury] [damage] [loss] [or] [harm]."

Nothing in *Mitchell* stands for the proposition that "cause in fact" and "substantial factor" require clarifying or amplifying instructions in order for the jury to properly understand those terms. To the contrary, *Mitchell* stated "the 'substantial factor' test . . . is 'sufficiently intelligible to any layman to furnish an adequate guide to the jury, and it is neither possible nor desirable to reduce it to lower terms.' [Citation.]" (*Mitchell, supra,* 54 Cal.3d at p. 1052.)

As used in section 422.75, "and as a matter of common usage, 'because of' means the conduct must have been caused by the prohibited bias. A cause is a condition that logically must exist for a given result or consequence to occur. [Citation.]" (*In re M.S.* (1995) 10 Cal.4th 698, 719, italics & fn. omitted.) In other words, the terms "cause in fact" and "substantial factor," as used in the instruction, are sufficiently self-defining and require no amplification or clarification to be understand by a reasonable jury. Accordingly, the trial court had no duty to instruct sua sponte on the meanings of "cause in fact" and "substantial factor." (*People v. Rowland* (1992) 4 Cal.4th 238, 270-271 [when a phrase "'is commonly understood by those familiar with the English language and is not used in a technical sense peculiar to the law, the court is not required to give an instruction as to its meaning in the absence of a request'"].)

If defendant desired a clarifying instruction, it was his burden to request it. (*People v. Lang* (1989) 49 Cal.3d 991, 1024; *People v. McNeill* (1980) 112 Cal.App.3d 330, 340.) Defendant's failure to do so waives the issue. (*People v. Mayfield* (1997) 14 Cal.4th 668, 778-779.)

DISPOSITION

The judgment is affirmed.

SCOTLAND, P.J.

We concur:

SIMS, J.

NICHOLSON, J.